

## STIPULATIONS

The Appeals Board has adopted the stipulations listed in the Administrative Law Judge's Award.

### **ISSUES**

The Administrative Law Judge found claimant suffered bilateral upper extremity injuries as the result of performing repetitive work activities while employed by the respondent. The Administrative Law Judge awarded claimant a 10 percent permanent partial general disability based on a 10 percent whole body permanent functional impairment rating.

From that Award, the respondent appealed and raised the following issues:

- (1) Are the medical reports of the nontestifying independent medical examiner, Mark J. Maguire, M.D., admissible evidence?
- (2) Did claimant sustain an accidental injury that arose out of and in the course of her employment with respondent on August 16, 1995?
- (3) What is the nature and extent of claimant's disability?
- (4) Is claimant entitled to future medical treatment.

Respondent's main contention is that the record does not support the Administrative Law Judge's finding that claimant suffered permanent injury to her bilateral upper extremities while employed by the respondent. The respondent further contends claimant has grossly exaggerated her symptoms during her testimony and to all of the physicians who have either evaluated or treated her.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the brief of the respondent, and hearing the arguments of the parties, the Appeals Board finds as follows:

- (1) The Administrative Law Judge, in an Order dated September 13, 1996, appointed Dr. Mark J. Maguire as a neutral physician to perform an evaluation of claimant for permanent functional impairment rating and permanent work restrictions. Dr. Maguire evaluated claimant on October 17, 1996, and issued two separate reports summarizing his findings, the first dated November 21, 1996, and the second dated May 6, 1997. The doctor did not believe claimant's work activities during the short period of time that she had worked for the respondent could have produced claimant's severe upper extremity complaints. He further concluded claimant's complaints were significantly exaggerated. Dr. Maguire also

concluded claimant did not have any permanent functional disability as a result of these alleged injuries.

The Administrative Law Judge found Dr. Maguire's medical reports should be disregarded because Dr. Maguire failed to provide a medical report that meets the requirements of K.S.A. 44-510(e).

The respondent argues Dr. Maguire's November 21, 1996, and May 6, 1997, medical reports should have been admitted into evidence and considered, without supporting sworn testimony, because the reports clearly concern the question of permanent functional impairment.

The Appeals Board agrees with the respondent that Dr. Maguire's medical reports do address the issue of claimant's permanent partial impairment and are admissible without testimony of the doctor. See McKinney v. General Motors Corp., 22 Kan. App.2d 768, 772, 921 P.2d 257 (1996). K.S.A. 44-510e(a) provides that the Administrative Law Judge shall consider the independent health care provider's opinion on permanent functional impairment. In this case, the Administrative Law Judge listed Dr. Maguire's medical reports as part of the record. The Appeals Board concludes the reports were admitted into the evidentiary record, but the Administrative Law Judge for some reason decided that Dr. Maguire's opinion should not be given any weight in determining whether or not claimant suffered permanent impairment. However, the Appeals Board, as an independent fact finder, can give Dr. Maguire's opinions as much weight as it determines appropriate.

(2) The Administrative Law Judge found claimant suffered bilateral upper extremity injuries as a result of her work activities while employed by the respondent. The Appeals Board agrees with this finding.

Specifically, this finding is supported by claimant's testimony that she started working for the respondent in April 1995. She further testified she first felt pain and discomfort in her right hand and wrist as she was working the latter part of June or the first part of July 1995. As she continued to work, pain and discomfort in her right upper extremity worsened and also pain and discomfort started in her left upper extremity.

At respondent's request, Vito J. Carabetta, M.D., treated claimant for her upper extremity complaints. Dr. Carabetta diagnosed medial epicondylitis and cubital tunnel syndrome. He attributed claimant's problems to her work, placed restrictions on claimant, but did not express an opinion on permanent functional impairment.

At the request of claimant's attorney, Dr. Lynn D. Ketchum, a board-certified plastic surgeon, examined the claimant on two occasions, April 10, 1996, and May 28, 1996. Dr. Ketchum diagnosed claimant with tendinitis of both lateral humeral epicondyles and fibromyalgia. He also opined claimant's repetitive work activities had aggravated her symptoms.

The Appeals Board concludes the testimony of claimant, Dr. Carabetta, and Dr. Ketchum prove claimant's upper extremity problems are related to her work.

(3) The parties filed a stipulation in this matter agreeing that the claimant was unemployed from the day she was released to return to work until she returned to work at a comparable wage on August 4, 1997. The Administrative Law Judge did not make a finding on what date claimant was released to return to work. The Appeals Board finds the record does not contain the specific date claimant was released to return to work. However, claimant was first seen by Dr. Carabetta on September 27, 1995, and he referred claimant to a number of other physicians including Dr. Bruce Toby of the KU Medical Center for examination and treatment. Claimant testified Dr. Toby placed her in a two week physical therapy program and then released her for light work with a ten pound lifting restriction. Claimant returned to the respondent with the work release and was laid off from work that day. This would put claimant's release to return to work around mid October 1995.

The Administrative Law Judge found there was no evidence in the record that claimant attempted to find employment between the date she was released to return to light duty work and August 4, 1994, the date she returned to work at a comparable wage. Therefore, the Administrative Law Judge limited claimant's Award, even during this period, to her functional impairment. See Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). The Appeals Board agrees with this analysis and claimant is limited to permanent partial disability benefits based on her functional impairment.

The Administrative Law Judge found Dr. Ketchum's 10 percent functional impairment rating as the most persuasive opinion and awarded claimant permanent partial disability benefits based on that rating. Respondent contends the record as a whole does not prove claimant suffered a permanent injury to her upper extremities. The Appeals Board recognizes the record contains evidence that claimant herself and through the coaxing of her husband was a symptom magnifier. Also, there are some inconsistencies in her testimony, however, considering the whole record, the Appeals Board finds that claimant has proved she did suffer some permanent impairment to her upper extremities while working for the respondent.

The Appeals Board concludes, in an effort to find the appropriate functional impairment rating for claimant's work-related injuries, that there is no reason not to give the independent medical examination physician Dr. Maguire's 0 percent permanent functional impairment opinion equal weight with Dr. Ketchum's 10 percent functional impairment rating opinion. Therefore, the Appeals Board concludes claimant is entitled to permanent partial disability benefits of 5 percent.

(4) The Appeals Board also concludes the claimant is entitled to future medical upon proper application and approval by the Director.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Steven J. Howard's Award entered December 5, 1997, should be, and is hereby, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Roberta A. Rousseau and against the respondent, Hallmark Cards, Inc., and its insurance carrier, Royal Insurance Company, for an accidental injury which occurred on August 16, 1995, and based upon an average weekly wage of \$378.36.

Claimant is entitled to 19.71 weeks of temporary total disability compensation at the rate of \$252.25 per week or \$4,971.85, followed by 20.51 weeks at the rate of \$252.25 per week or \$5,173.65 for a 5% permanent partial general disability, making a total award of \$10,145.50 which is currently due and owing and ordered paid in one lump sum less amounts previously paid.

All orders contained in the Administrative Law Judge's Award that are not inconsistent with this Order are adopted by the Appeals Board as if specifically set forth herein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James E. Martin, Overland Park, KS  
John David Jurcyk, Lenexa, KS  
Steven J. Howard, Administrative Law Judge  
Philip S. Harness, Director